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No. 96-185

In The
Supreme Court of the United States
October Term, 1996

ELPIS SAKARIA *and* JACK AND LILLIAN HILLMAN,
Petitioners,

vs.

DARE COUNTY BOARD OF EDUCATION,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE** OF AMERICAN HOMEOWNERS FOUNDATION, AMERICAN LAND RIGHTS ASSOCIATION, CITIZENS AGAINST REPRESSIVE ZONING,

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BRIEF *AMICI CURIAE* OF
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS, INC.,
DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION,
ENVIRONMENTAL CONSERVATION ORGANIZATION,
FRONTIERS OF FREEDOM,
HILL COUNTRY HERITAGE ASSOCIATION,
LAND RIGHTS FOUNDATION,
THE NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,
THE HONORABLE RICHARD W. POMBO — MEMBER OF CONGRESS,
TRANS TEXAS HERITAGE ASSOCIATION,
and DEFENDERS OF PROPERTY RIGHTS
IN SUPPORT OF PETITIONERS

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Defenders of Property Rights (Defenders), moves this Court pursuant to Rule 21.2(b) of the Rules of this Court for leave to file the attached brief *amici curiae* to present arguments stating why the Petition for Writ of Certiorari should be granted. This case raises significant issues regarding the power of the federal government to coerce a state agency to use its power of eminent domain to carry out a federal objective. Specifically, the Army Corps of Engineers has orchestrated the condemnation of private property for wetland creation by a county school board, whose narrow eminent domain authority allows it to obtain property to construct school facilities.

Defenders' mission is to vigorously protect constitutionally protected property rights. Attorneys of Defenders have been counsel of record or *amicus curiae* in numerous significant property rights cases nationwide involving government decisions affecting private property rights, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995).

Defenders also devotes a significant portion of its resources to the litigation of regulatory taking issues across the country on behalf of property owners whose rights have been infringed in violation of the Fifth Amendment. Thus, Defenders is in a unique position to illustrate the gravity of the North Carolina Supreme Court's decision upon residential property owners nationwide. More importantly, the information presented in the attached brief will assist this Court in resolving the critical constitutional issues at stake in this case.

Counsel for Respondent has refused to consent to the filing of the attached brief *amici curiae*, thereby necessitating the filing of this motion.

For the foregoing reasons, Defenders respectfully requests that this Court grant this Motion.

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Dated: October 1, 1996

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Army Corps of Engineers' coercion of a county school board -- through its ability to impose sanctions (civil and criminal) under the Clean Water Act -- to carry out a federal objective at the local level violates the Tenth Amendment?

2. Whether a state law conferring the power of eminent domain must be strictly construed to preclude manipulation and expansion by the federal government of that power and thereby avoid abrogation of private property rights?

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Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of Petitioner.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners.

American Land Rights Association (Battle Ground, WA) is a non-partisan grassroots coalition of farmers, ranchers, private property owners, rights holders, loggers, miners, and outdoor recreation advocates in or near federally managed areas or who are affected by federal land use or environmental laws and regulations.

Citizens Against Repressive Zoning (Haslett, MI) was formed to protect property rights at the local level. The organization works to curb abuses of zoning practices in counties, cities, villages, towns, townships, and parishes.

Citizens for Constitutional Property Rights, Inc. (Crestview, FL) is a statewide grassroots organization whose mission is to secure private property guarantees provided in the Bill of Rights.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas.

Environmental Conservation Organization (Hollow Rock, TN) promotes free-market alternatives to excessive regulations and is vitally concerned with federal procedures which erode private property rights.

Frontiers of Freedom (Arlington, VA) is a grassroots membership organization founded to promote the basic ideas of the Founding Fathers as articulated in the Constitution to ensure the maximum amount of individual and economic freedom for every American.

Hill Country Heritage Association (Lampasas, TX) champions the concept and practice of the conservation of natural resources in conjunction with respect for individual property rights.

Land Rights Foundation (Gloversville, NY) is an educational organization dedicated to providing information concerning the right to own and enjoy property as guaranteed by the United States Constitution and state constitutions.

The National Center for Public Policy Research (Washington, DC) promotes innovative free market solutions to environmental problems -- solutions that minimize the sacrifice of American families.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states.

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders engages in litigation across the country affecting the public interest and the private property rights of its membership to vigorously protect those rights considered essential by the framers of the Constitution.

STATEMENT OF THE CASE

The issue raised in this case -- whether the U.S. Army Corps of Engineers through its ability to impose sanctions (civil and criminal) may coerce a county school board to carry out at the local level a federal objective -- involves a classic scenario that is being replicated in other contexts all across the

country. In the instant case, the Respondent county school board (Board) needed to enlarge the athletic facility of one of its schools in order to obtain accreditation. Therefore, a proposal to enlarge the school was developed using adjacent property. However, before a building permit could be issued, the federal government (United States Army Corps of Engineers)(Army Corps) stepped in and declared that some of the land on which the school board planned to build the athletic field is "wetland." Going forward with the planned construction without a federal wetland permit would subject the Respondent to civil and criminal sanctions. Without the expansion, the school could not be accredited.

Faced with this Hobson's choice (incur the Corps' sanctions or comply with the Corps' wetland permitting requirements), the Respondent "chose" to comply with the federal government's requirements. As a result of this coercion, the Respondent became the "instrumentality" of the federal government in violation of the Tenth Amendment of the U.S. Constitution. *New York v. United State*s, 505 U.S. 144 (1992). That is, Petitioners' privately owned building lots were not condemned to further a state goal or objective; rather,

the condemnation was carried out to satisfy federal mitigation requirements set forth in Section 404 of the Clean Water Act.

In fact, the Respondent never had any intention of condemning the Petitioners' lots for its own use. Indeed, the condemnation of Petitioners' lots could not have been for a state purpose since there is nothing in the Respondent's enabling act authorizing the condemnation of private property to satisfy the requirements of the Clean Water Act.[1]

As explained by the 1968 holding cited (but not applied) by the court below, *State Highway Comm'n v. Matthis*, 163 S.E.2d 35 (N.C. 1968), the general rule is that a state's power to condemn private property is limited: "An agency of the State established by act of the General Assembly is not empowered to exercise the State's inherent right of eminent domain unless such power is expressly granted by the General Assembly." *Id.* at 37, citing 26 Am. Jur. 2d *Eminent*

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[1] Section 115C-517 of the North Carolina General Statutes sets forth a narrow set of circumstances in which condemnation of private property by the Respondent is appropriate: To acquire a "suitable site or right-of-way" for "a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities. " N.C. Gen. Stat. § 115C-517 (1995). There is nothing in that delegated grant of authority that even suggests that the Respondent is empowered to condemn private property to accomplish a federal objective, in this case, achievement of the Section 404 objectives of the Clean Water Act .

Domain § 5. As the court below properly observed, the state's power of eminent domain is limited because:

> [T]he exercise of the power of eminent domain is in derogation of property rights, all laws conferring this power must be strictly construed; therefore, statutory grants of the power of eminent domain are "limited to the express terms or clear implication of the act or acts in which the grant of the power of eminent domain is contained."

Pet. App. at 7b-8b (citations omitted).[2]

Thus, the failure of the court below to construe narrowly the Respondent's authority to condemn private property has not only upset the balance of power between the state and the individual (Fifth Amendment private property rights of Petitioners), but it has also upset the balance of power between the federal government and the state (Tenth Amendment protections).

The resolution of these constitutional issues is of enormous significance because so much private land is under the jurisdiction of the federal government as "wetland." Under the current federal wetlands manual, as much as sixty percent of the total United States land area is deemed "wet."[3]

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[2] Reference to Petition for Writ of Certiorari Appendix.

[3] For example, according to some federal guidelines, forty percent of the state of California is presumably "wet" and ninety percent of the state of

Moreover, approximately 74 percent of the nation's wetlands are privately owned. White House Office on Environmental Policy, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach* (Aug. 24, 1993).

Given the sheer number of acres affected by the federal wetlands program (anywhere from 100 million to 200 million acres), it is no surprise that the wetlands enforcement program has burgeoned over the lack two decades into a permitting program requiring the processing, for example, of 28,000 permits in 1992. Letter from John H. Zirschky, Acting Assistant Secretary of the Army (Civil Works), and Robert Perciasepe, Assistant Administrator for Water (Environmental Protection Agency) (Mar. 29, 1994), *reprinted in* Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* (1994) at Appendix C.

A major component of the federal permitting program involves "mitigation," a process whereby new wetland is created in exchange for being granted permission (in the form of a Section 404 permit) to disturb land deemed wet. Typical mitigation requirements can range from the applicant

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Alaska may also be legally "wet." Dixy L. Ray, *Environmental Overkill* 99 (1993).

being required to create or dedicate as much wetland to be disturbed, to being required to create or dedicate ten times as much wetland to be disturbed.[4] In 1993, for every acre of wetland lost or impacted by development pursuant to Army Corps-issued permits, 1.3 acres of wetland were created. Virginia S. Albrecht & Bernard N. Goode, *id.* § 5.26.

Given the breadth and reach of the federal wetland program alone, the ramifications of allowing the decision below to go unreviewed sends the clear message to all states and school boards across the country that they are free to abrogate the Tenth Amendment and to become instrumentalities of the federal government, cavalierly destroying private property rights.

Accordingly, *amici curiae* urge this Court to grant this Petition for Writ of Certiorari to review the decision below and provide guidance to lower courts on the important constitutional issues regarding the state's power to condemn private property for a federal purpose and whether that power must be strictly construed to protect private property rights.

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[4] In the instant case, the federal government demanded that 1.84 acres be dedicated as wetland in order to obtain the federal Section 404 permit.

STATEMENT OF FACTS

Prior to the Respondent's condemnation of Petitioners' property, Petitioners Elpis Sakaria, a widow, and Jack and Lillian Hillman each owned beautiful beach-front property with trees and wild flowers on which they intended to build retirement homes. Both building lots are zoned residential and have provisional approval for septic system installation.

At the same time Petitioners were planning to build their retirement homes, Respondent Dare County Board of Education (Board) began to undertake expansion of the athletic facilities for the Cape Hatteras School in Buxton, North Carolina. The expansion was necessary to obtain accreditation from the Southern Association of Secondary Schools and Colleges. Pet. App. 2b.

Originally the Board intended to use a 12.5 acre tract of land that it owns for the necessary expansion. However, 3.1 acres of that 12.5 acre tract[5] of land were designated "wetland" by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act, and under jurisdiction of the North

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[5] There is an ambiguity in the number of acres of Respondent's parcel that is considered wetland by the U.S. Army Corps of Engineers. For the purpose of this argument, *amici curiae* adopt the figures cited by the North Carolina Court of Appeals and in the Petition for Writ of Certiorari.

Carolina Department of Environment, Health, and Natural Resources, Division of Coastal Management (Coastal Management). Although the Respondent never wanted to condemn Petitioners' property, the Respondent was conscripted into selecting and condemning the property in order to obtain the federal Section 404 permit.

Indeed, the U.S. Army Corps of Engineers had denied the Respondent's first two applications (in 1988 and 1992) for the dredge and fill Section 404 permit needed to build athletic fields on the 9.4 acres. The reason for the denials was that the activity would result in an "unacceptable loss of wetlands." Pet. App. 3b.

The Respondent considered approximately forty-one off-site parcels, but each was rejected because the Army Corps had given lower "preference" to off-site mitigation than to adjacent mitigation. Pet. App. 6b. Thereafter, the Respondent's selection process was primarily driven by the goal of adhering to the Army Corps' "sequence of preference." *Id.* Based upon the Corps' "sequence of preference" the Respondent submitted a third application to the Corps -- which

included condemning Petitioners' building lots -- which was accepted.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. This Case Raises An Important Constitutional Issue Which Should Be Resolved By This Court -- Namely, Whether Coercion By The U.S. Army Corps Of Engineers -- Through Its Ability To Impose Civil And Criminal Penalties Under The Clean Water Act -- Of A County School Board, To Carry Out A Federal Objective At The Local Level, Violates The Tenth Amendment.

The Tenth Amendment assures us of a federal government of limited power.[6] In *New York v. United States*, 505 U.S. 144 (1992), this Court held that the Tenth Amendment limits the power of Congress to regulate state actions: "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161. *See also Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981).

At issue in *New York v. United States* was a federal law that required states to take title to and possession of low-

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[6] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

level radioactive waste generated within the state's borders. In holding that the legislative scheme, which coerced state action, violated the Tenth Amendment, this Court explained: "We have always understood that even whether Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York*, at 166. Critical to this Court's analysis was the fact that the state had no meaningful choice but to succumb to the federal government's coercive scheme: "No matter which path the State chooses, it must follow the direction of Congress." *Id.* at 177.

More recently, the United States Court of Appeals for the Fifth Circuit applied this Court's holding in *New York v. United States* in two similar contexts. In *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 22, 1996) (No. 96-174), the court examined a provision of the Lead Contamination Control Act (LCCA) requiring states to establish programs to remove lead contaminants from schools and day care centers. The Fifth Circuit held that the requirement violates the Tenth

Amendment -- despite the government's claim that states had the complete discretion to determine the means employed for achieving the Act's goals:

> [The LCCA] *requires* each State to "establish a program, consistent with this section," . . . Failure or refusal to establish the mandated program subjects the States to civil enforcement proceedings. . . . The States thus face a choice between succumbing to Congressional direction and regulating according to Congressional instruction, or being forced to do so through civil action in the federal courts. In actuality, this "is no choice at all."

Id. at 1394 (emphasis in original)(citations omitted).

Similarly, in *Koog v. United States,* 79 F.3d 452 (5th Cir. 1996), *petition for cert. filed sub nom. Gonzalez v. United States*, 65 U.S.L.W. 3001 (U.S. June 25, 1996) (No. 95-2077), the Fifth Circuit held that the duties directly imposed on local law officials under the Brady Act also violated the Tenth Amendment:

> The Brady Act requires the CLEOs [local law officials] to make the essential policy choices raised by the Act, namely, to decide exactly how intrusive a background search to conduct. . . . The CLEOs, not Congress, are to gauge the intrusiveness and cost, paid with local tax dollars, of an extensive background check. And the CLEOs, not Congress, are to weigh these negatives against the extent of community support for background checks

> and any benefits that background checks may bring, such as increased safety to the community. In the most fundamental sense, the CLEOs are crafting a local solution to what the Brady Act recognized as a national problem.

Id. at 457.

The rationale employed in *New York v. United States,* and amplified in these two recent Fifth Circuit decisions, is directly applicable to the case at bar. True, in the instant case it is a federal agency and a regulatory scheme instead of Congress and legislation that compelled the state action. But those distinctions do not distinguish this case from *New York.* Here the Respondent never intended nor even needed to condemn Petitioners' property in order to enlarge the athletic field. Rather, the U.S. Army Corps of Engineers and its enforcement of its regulatory scheme under the Clean Water Act compelled the condemnation.[7] Far from having a choice of whether to carry out the condemnation, the Respondent would have been subject to substantial sanctions had it undertaken the proposed development without the Section 404 permit. 33 U.S.C. § 1319 (1988).

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[7] One might argue that the Board could simply have declined to purchase the property, however, it is not a "meaningful alternative" to require the Board to forego accreditation. *New York v. United States*, 505 U.S. 144 (1992)

In short, there is no "carrot" but only a "stick" for the Respondent in the U.S. Army Corps wetland regulatory scheme. Thus, just as the Fifth Circuit concluded with respect to the LCCA in *ACORN v. Edwards*, this coerced condemnation of Petitioners' property clearly violates the Tenth Amendment.

Even if the mitigation site selection process was a "negotiated" decision, as an environmental consultant described it at trial, Pet. App. at 6b, the legal analysis does not change. The United States Court of Appeals for the Federal Circuit has described the unequal power of the Army Corps in similar circumstances:

> The trial court's characterization of the role of the United States as that of a private person is flawed by its disregard of the express notice, "dredging is prohibited." Private persons do not talk like that; governments do. . . . But the United States is not a private party. It imposes penalties, criminal and civil, the threat of which lurks behind government statements like those here involved, regardless of what the government may have intended. The United States calls upon unlimited resources.

Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 889 (Fed. Cir. 1983).

The unequal bargaining power of the federal government translated in this case into the condemnation of Petitioners' property. In condemning the Petitioners' property the Respondent Dare County School Board functioned as a local arm of the U.S. Army Corps of Engineers, itself an indication of a Tenth Amendment violation:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart.

New York v. United States, 505 U.S. 144, 188 (1992).

Therefore, on the basis that the condemnation of Petitioners' property was coerced in violation of the Tenth Amendment, *amici curiae* urge this Court to grant the requested Petition for Certiorari.

II. A State Unconstitutionally Expands Its Power Of Eminent Domain, Which Must Be Strictly Construed To Avoid Abrogation Of Private Property Rights, When The Power Is Used To Accomplish A Federal Regulatory Purpose Unrelated To The Purpose Of The State Government Agency.

As this Court explained in *New York v. United States*, the fundamental purpose of the Tenth Amendment is not to

protect the State (or the Respondent in this case), but to protect the individual citizen -- the Petitioners: "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992), *citing Coleman v. Thompson*, 501 U.S. 722, 759 (1991). Had the court below enforced the Tenth Amendment in the instant case, Petitioners would not have lost their property under an unconstitutional regime.

The significance of this error is underscored by the fact that private property ownership (and the rights associated therewith) is the barrier between the individual and the naked power of the state.[8] Property rights is the guarantor of all of the freedoms we enjoy in this country:

> The dichotomy between personal liberties and property rights is a false one. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a fundamental interdependence exists between the personal

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[8] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, *nor shall private property be taken for public use, without just compensation.*" U.S. Const. amend. V (emphasis added).

> right to liberty and the personal right in property. Neither would have meaning without the other.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

As this Court also warned in 1922, despite the clear benefit to all society in terms of individual freedom and liberty, the natural tendency of government is to erode private property rights: "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend that qualification more and more until at last private property rights disappear."[9] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The court below upheld this "natural tendency" to allow erosion of private property rights by broadly construing the state's authority to condemn private property. Indeed, the court below itself noted that the power of eminent domain "is in derogation of private property rights" and therefore stated that "all laws conferring this power must be strictly construed." Pet. App. at 8b. Nevertheless, the court below failed to apply its own standard and astonishingly held that the

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[9] Indeed, just as surely as the "power to tax is the power to destroy," so is the power to condemn private property. Thus, the power of eminent domain must in all circumstances be narrowly construed. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

Respondent School Board has the "discretionary" authority to condemn for whatever reasons it thinks best. *Id.* Such a holding flies in the face of the very notion of strict construction.

Moreover, the Respondent, in its endeavor to satisfy the dictates of the U.S. Army Corps of Engineers, did not even consider the constitutionally protected property rights of the Petitioners. The decision below indicates that the sites for mitigation were selected "for various reasons, including distance, expense . . . We were trying to meet all the regulatory requirements. . ." Pet. App. at 6b. Nowhere in this analysis do considerations of "economic impact on the private property owner" or "destruction of the investment-backed expectations" even appear in the selection equation.[10]

Compounding the federal government's abuse of its power to coerce the Respondent to condemn Petitioners' property for its own purpose in the first instance, is the fact

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[10] This is not to suggest, however, that the construction be so narrow as to preclude a reasonable interpretation of condemnation authority to allow the state to accomplish a purpose necessarily incidental to the main use. *See generally* Carman F. Randolph, *The Law of Eminent Domain* § 113 (1991). However, a strict construction of Respondent's power of eminent domain would not preclude such a reasonable conclusion, but it would preclude the clearly unlawful exercise of eminent domain in the present case to accomplish the goals of the Clean Water Act.

that the value proposed for Petitioners' property was significantly reduced because it is deemed "wetland" by the U.S. Army Corps of Engineers. Thus, the Respondent was able to condemn Petitioners' building lots once valued at $139,000 per lot for a fraction of their original market value -- to satisfy the U.S. Army Corps mitigation requirements. In short, the abuse of governmental power has gone full circle.

CONCLUSION

For the foregoing reasons *amici curiae* respectfully urge this Court to grant the Petition for Writ of Certiorari and resolve these important constitutional issues.

Respectfully submitted,

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